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The first section of this document narrates Southern resistance to integration from 1964 to 1967, and the second relates the weakening of civil rights legislation through the influence of Southern Congressmen and other moderates in Congress. A detailed discussion of the Macon County and Jefferson County (Alabama) school desegregation decisions is presented in the Appendix. Charts are included. (KG)

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SPECIAL REPORT

SOUTHERN REGIONAL COUNCIL
5 Forsyth Street, N.W., Atlanta 3, Georgia

LAWLESSNESS AND DISORDER

Fourteen Years of Failure in Southern School Desegregation

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

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LAWLESSNESS AND DISORDER

Fourteen Years of Failure in Southern School Desegregation

Thou hypocrite, first cast out the
beam out of thine own eye; and then
shalt thou see clearly to cast out
the mote out of thy brother's eye.
--Matthew, 7:5.

Introduction

This report is the third in a period of four years in which the Southern Regional Council has attempted to tell the nation of the deplorable degree of failure in the South to comply with the law of the land against racial discrimination in education, and to suggest the terrible implications of this failure.

In the previous two reports, in 1965 and 1966, there were empirical and psychological reasons for including some guardedly optimistic, some hopeful words, saying that surely the situation would be corrected. This would come, it could be felt, once the nation realized the extent of failure, of resistance by men of public trust in the South, of ineptitude and unrealism on the part of those charged with enforcement, of savage damage done to children of both races by this enduring record of flaunting the law.

This time there seems almost no hope, virtually no reason to find optimistic words, to say things may improve. The mistakes of the past are repeated. The nation has not seemed aware even of the failure, let alone resolute enough to end it.

Such a dismal report comes at a time when many Americans --young people and Negroes especially--are disaffected, disillusioned, disgusted with the government, the basic institutions, the socially expressed values of their country.

Riots, repressions of civil liberties, distrust to the degree of hatred of police by many citizens, acrimony so bitter in the exchange of ideas that debate degenerates into cat-calls, the murder of leaders--these are the marks of the disintegration to which American public life has come. A tendency to anarchy, a willingness to destroy the good along with the bad of such a basic institution as higher education, is evident on the one hand. A tendency to right-wing totalitarianism is evident on the other.

And the public expresses its perception of all of this with a cry for law and order. Politicians use the term as a shibboleth.

There have been lawlessness and disorder rampant across the South since 1954 regarding the just requirement that racial discrimination in education be ended. This has been the signal failure in a whole incredible series of failures in the rights of Negroes, in society's obligations to the poor. Children are starving among us, and the official reaction is most often to deny the existence of that starvation, rather than to respond to it, alleviate it.

The real story told in this report is that of where the real breakdown in law and order, all along, has been. It is a terrifying story of the object lesson in dishonesty and hypocrisy our government and our society have provided for a whole generation of young Americans.

The only real hope that we can put into a report like this is the fervent one that the American people will come

to see what true law and order means, and act at last to achieve it, with justice for all.

Pat Watters

PART I

FULL CIRCLE OF FAILURE

by Glenda Bartley
Director of Research
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In the long decade between the Supreme Court's first decision in Brown v. Topeka Board of Education and passage of the Civil Rights Act of 1964, faith in the ability of federal courts to affect substantial integration in the public schools of the South had sharply diminished. At the time Congress gave legislative sanction to the nation's fundamental law, there were only 34,105 (1.17 per cent of Negro enrollment) Negro children attending school with whites in the eleven southern states. Hope now hinged on Title VI of the act, which contained the ingredients for a small revolution. Then, for three, bitter, frustrating, defeated years, attention was focused on the enforcement agency for Title VI--the Department of Health, Education and Welfare. It seemed that HEW's Office of Education with its power to cut off federal funds now had the weapon to wring compliance from the previously unbudgeable South, that school desegregation would cease to be a phenomenon of urban tokenism.

Essentially, the shift away from the courts to the executive branch made school desegregation wholly an administrative matter.

The Administrative Era

In the first year of this administrative era (1965), the Office of Education issued guidelines for compliance with the act. The freedom-of-choice clause (theoretically

allowing parents to send their children to any school in a given system) in these guidelines, and in those issued subsequently, still placed the burden of desegregation on Negro school children and their parents, but the weight of resistance was shifted from southern legislatures to individual school administrators. Neither the novices at HEW nor experienced observers outside the South calculated the nature and ability of their new adversaries. School administrators in a region yet uncommitted to education are a lonely and beleaguered lot. (Support for education as a regional panacea is more dogma than dollars.) Early outraged protest over federal intervention and federal control soon settled into the sure manipulation by one parallel bureaucracy of the other.

It was also during the brief period before schools opened under the first guidelines that the real violence set in. The previous ten years had been relatively free of it in the matter of school desegregation. There was Mansfield, and Clinton, and Little Rock, and New Orleans, where screaming mother-mobs appeared on television as the first wave of mass media theater of the absurd. But the violence was done mostly to psyches of the few Negro children. During the first judicial era (1954-64), the mode of southern private resistance was as often economic as physical terrorism. And the targets of the bombs, beatings, burnings, bullets, firings, credit cut-offs, and foreclosures were most often not parents who tried to send their children to "white" schools, but people who tried to gain access to

public accommodations, register to vote, and the like. This was largely because there were virtually no Negro parents making the attempt in the rural areas and small towns where the varieties of terrorism have been most virulent. In the cities, where most of the (token) school desegregation occurred during the first judicial era, the terrorism was mainly within the schools, a low-grade, day-by-day torture of the Negro children by their schoolmates, teachers, and administrators.

Out in the rural areas of the South, where law enforcement was repressive before it became fashionable to be so, the advent of the guidelines, the threat that black children might actually go to school with white children, brought a wave of terror unmatched since post-Reconstruction whites rode around in bedsheets. And economic retaliation against the few Negroes who chose the "white" school did not abate.

In September, 1965, 184,308 (6.1 per cent) Negro children enrolled in "white" schools.

In spite of the increased violence and the pitifully small number of Negroes in desegregated situations, there was a national misunderstanding of what was happening in the South. There were several reasons for this. The administrative experiment was taking place in rural areas of the South--crossroads towns and hamlets as ill-geared for news coverage as Ulverstone, Tasmania. And, since there had been virtually no desegregation at all before, any small gain was often hailed as a triumph. Another reason for the national misunderstanding was perhaps caused by national

news media's probably unconscious wish to have done with the violence attendant on any significant social change in the South. This passion for tranquility, for order, has led many a responsible reporter, magazine, newspaper, and television network to announce the advent of another school year as an occasion of "increased desegregation," or even "massive desegregation...without violence." (An example of such was the story which ran under a headline proclaiming that school desegregation swept peacefully across Dixie: the story itself recounted instances of desegregators' homes fired into--as many as 32 times--in three towns in one state alone.)

March, 1966, brought new guidelines aimed at plugging some of the loopholes that observers felt accounted for the debacle during the first year of the administrative era. Freedom-of-choice, the most commonly used southern compliance method, remained. The choice forms were mailed that spring; federal negotiations with individual districts continued; a few school systems, notably in Alabama and Mississippi (with their unpopular national image), had their funds terminated; private agencies, already cognizant they were doing the federal government's job, sent field workers to persuade Negro parents to choose the "white" school.

In 1966 there were 2,598,842 (or 88 per cent of the Negro enrollment) in all-Negro schools, more, due to population increases and the small amount of desegregation, than had attended segregated schools in the year of the first Brown decision.

New guidelines were issued in December, 1966, but it was about over--the administrative era. Negro parents, target of every trick known to a national minority accustomed to working its will on the nation in matters of race, were getting tired. Negro children, in all too many instances in desegregated schools abused, excluded from activities, were disillusioned. Private agencies' field workers, who had often been Negroes' only assurance that all of white America was not hostile, that they and their children were not totally alone, were reluctantly pulling out.

When school opened in September, 1967, 86 per cent of southern Negro students remained in segregated schools. Figures for the Deep South were more depressing: Alabama, 94.6; Mississippi, 96.1; South Carolina, 93.6; Georgia, 90.1; and Louisiana, 93.3.

Defeat for the administrative experiment in education in the only large nation without a national school system came for a number of reasons. Freedom-of-choice was a fatal blunder. It allowed the violence to work its will, permitted white terrorists a victory denied their "respectable" counterparts of the 1950's. Negro parents, who had from the first simply been interested in getting their children the best education available, failed to see the educational value of losing a job, being shot at, in order that the children might attend a school only a little less bad than the "Negro" one. Even without white resistance, the free choice concept in its pure form is an administrative impossibility. Realizing this early on,

authors of guidelines and court orders as well were forced to attach exemption clauses (read as loopholes by southern schoolmen) taking into account such physical realities as "proximity," "overcrowding" and the like.

The confounding of Title VI was perhaps present all along within the same act. Title IV, little noticed in 1964, has haunted all the efforts launched under Title VI. There are many districts in the South which are like Washington, D. C., where the school population is mostly Negro and defies conventional zoning or other plans to make it desegregated. Such districts in the South are still overwhelmingly rural, but Atlanta, Memphis, Richmond, and other cities are already, or soon will be, in this category. Title IV prohibits "bussing" to achieve racial balance. How then desegregate majority-Negro districts, or large school systems in which de facto housing segregation perpetuates school segregation? Pairing (making one elementary school serve grades 1-2, another grades 3-4, etc., drawing children from wider geographic areas in the process), said some experts. Combination pairing-zoning, said others. And still others suggested educational parks, federally financed in fringe areas to accommodate suburban whites and ghetto blacks. This would be achieved with urging from (the same) Title IV's technical assistance teams and pressure of fund termination from Title VI (carrot and stick, repeated ad nauseum--the carrot magically to overcome heretofore sacrosanct district boundaries, to say nothing of county lines and jurisdictions hallowed in

the South, but the other part of the formula, the basic question, ignored--WHAT STICK?). The restriction on bussing eliminated the possibility of drawing up zone plans which would ultimately destroy the dual school structure--erase the designations "Negro" and "white."

It is therefore useless (and even cruel) to criticize too strongly the failure of the Office of Education to map a strategy other than freedom-of-choice.

The weapon--termination of federal funds--did not prove effective. Most often the sufferers were the pitiful black schools. Many southern superintendents seem to hold to the philosophy that "Negro" and "federal" are synonymous terms. These schoolmen use federal school funds, like those allotted under Title I of the Elementary and Secondary Education Act for upgrading education in "deprived" areas, to bring Negro schools' per pupil expenditures up to the level afforded "white" schools by local finances.

Perhaps the best summary of the failure of the administrative experiment is contained in an example of massive school desegregation as it swept non-violently across Unadilla, Georgia.

Roy Hunter was beaten by schoolmates more than once at Unadilla High School and received threats on his life up until the moment of his singular dark presence in the graduation exercises from that seat of learning. Three years before, in 1965, his mother, fired from her job, had found a dead bear on her front porch--local whites' reminder that her eight children had chosen the wrong school. Finally, in 1968, Unadilla lost its federal

money--200,000 badly needed dollars. All but $25,000 of that money had gone to the Negro school--much of it spent for lunches (upgrading education in the South is all too often a matter of feeding children who get little food at home). The community raised tax millage to replace the $25,000, and the superintendent announced that since the system no longer received federal funds, the "white" school would no longer accept black children. The Hunter children had been the only desegregators all along. Displaying the kind of courage that seems required of those who still believe in this country's fundamental law, they again attended the "white" school in the fall of 1968.

The Second Judicial Era

March 29, 1967, marked the advent of the second judicial era in school desegregation. The Fifth Circuit Court of Appeals, sitting en banc (full court), directed each state within the circuit to take all necessary affirmative action to bring about a "unitary school system in which there are no Negro schools and no white schools--just schools."

In October, 1967, the Supreme Court refused to review the order, and the National Association for the Advancement of Colored People declared the Fifth Circuit ruling to be "the most influential school desegregation opinion" since Brown versus Topeka.

Indeed it was. In effect it gave legal sanction to the guidelines, while insisting that freedom-of-choice plans would be thoroughly examined by the courts to deter-

mine whether the method was working.

On May 27, 1968, the Supreme Court issued a similar ruling, stating that,

> In desegregating a dual system of public education, a plan utilizing student 'freedom-of-choice' is not an end in itself but is only a means to the constitutionally required end, the abolition of the system of segregation and its effects, and, if it proves effective, it is acceptable, but, if it fails to undo segregation, other means must be used to achieve that end.*

Clearly freedom-of-choice had failed in almost every instance to abolish "the system of segregation and its effects."

The decisions renewed hope, all but bludgeoned to death by more than a decade of too many Unadillas, an Ezekiel's Wheel kind of hope that freedom-of-choice itself would be abolished. At the same time civil rights and legal agencies were renewing their efforts to desegregate southern schools, Education Commissioner Harold Howe, II, was expressing federal relief at the re-entrance of the courts in a manner which should have been ominous to those who were anticipating a new concerted effort by executive and judicial branches. Howe said: "Our policies are clearly supported by the courts.....It's not as necessary now as it formerly was for those of us in Education to have a role in civil rights compliance."

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*Green v. County School Board of New Kent County, 88 S.Ct. 1689 (1968).

A federal district court in Alabama had issued an order (also in March, 1967) which would, in fact, result in a collision of the two branches of the federal government in the matter of school desegregation. Lee v. Macon County placed 99 of Alabama's 118 school districts under court order. These were districts that had formerly been operating under HEW guidelines. During the summer of 1967, HEW declared that the Lanett, Alabama, school system was not in compliance with the guidelines and was therefore ineligible for federal aid; Lanett school officials protested that they were now under a court-approved plan, and in July the court held that it was the court's responsibility to determine whether school systems were in compliance with its order. Urging HEW to continue investigations and to report any failures to comply, the court warned, however, that HEW could only take action with its specific approval.

But meanwhile, all across the South during 1967 and the spring and summer of 1968 old school cases were reopened and new ones filed. Results were familiar to those old enough to remember Brown I and Brown II. District courts in numerous cases overthrew freedom-of-choice plans and ordered school boards to submit geographic zoning plans drawn so as to afford substantial desegregation.

In many respects the new judicial era was exactly like the old. It introduced an entirely new concept in equal education to southern whites. No less revolutionary than the Supreme Court's announcing in 1954 that separate

educational facilities were inherently unequal was the idea that desegregation meant white children attending formerly "Negro" schools. Freedom-of-choice had been the interim separate but equal, not a transitional concept, but educational dogma. HEW's acceptance of gradualism was not nearly so damning as its acceptance of the southern solution. Freedom-of-choice meant Negroes, as many as could stand it, in white schools. New, court ordered, the zone concept literally meant mixing the schools. Administrators (the South, they said, the people, simply weren't ready for it, no sir) reluctantly drew up the new plans.* Through the late spring and early summer resistance grew. Just as in the first judicial era, it was mainly the cities of the South that were affected. And the resistance had a citified, sophisticated new look, not seen since the administrative experiment moved the issue to the rural South. Committees, organizations (Stand Together and Never Divide, etc.) of white parents formed (reformed, in many instances--a new generation of resisters) to fight for freedom-of-choice. Almost without exception they were victorious.

The new judicial era fell victim to many of the traps that had plagued the old one. Federal judges, admittedly

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*The Supreme Court stated in Brown II (1955): "It should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education of Topeka, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

not educators, were often forced to believe elaborate arguments by schoolmen that what the courts requested was simply not (immediately) possible. Redraw all school boundaries...75,000 children involved...teachers already assigned...overcrowding...undercrowding...BUSSING...You see, your honor, we would very much like to comply with the court order, and we will...but not now. (A federal district judge in Mississippi recently ruled that, since whites would pull out of a zone-desegregated school system, freedom-of-choice was consititutional. This bit of tortured judicial reasoning was engendered by a poll, conducted by whites, of whites in the district. The poll revealed that white parents would refuse to send their children to public schools; therefore, no desegregation would exist. So, freedom-of-choice would, at least in theory, allow more desegregation.)

Also, pressure by white parents in many locales had almost the same effect as threats by southern legislatures a decade before. These parents, through their organizations, said they would, and in some instances did, close the schools down rather than desegregate them. (In Chesterfield County, South Carolina, schools were closed for a week due to protests by white parents. They were reopened September 15, 1968, after the board reinstituted the freedom-of-choice plan.)

Mobile, Alabama, seemed to sum up the first year of the new judicial era: The Mobile case had been in court for many years. The system was operating under freedom-of-choice. In 1967 two per cent of Negro school children attended "white"

schools. The Fifth Circuit Court of Appeals in March, 1968, instructed the school board to adopt a rigid (no provisions for transfers within the system to avoid attending a desegregated school) zone plan, which would have placed about 1,400 white children in formerly all-Negro schools. White parents organized (Stand Together, etc., and Whites Organized for Rights Keeping); the area's state senator filed a motion in federal court seeking to overturn the new ruling on grounds it would be unsafe for white children to attend all-Negro schools. After a summer of legal battling the federal district judge who had issued the initial order came up with a plan allowing senior high schools to operate under freedom-of-choice, requiring specified attendance zones for elementary and junior high schools, and permitting more liberal transfers within the attendance zones. When school opened in September, an estimated 3,500 Negroes were in formerly all-white schools; but very few whites were in formerly all-Negro ones.

Mississippi, as usual, was the epitome of frustration, confusion, and a certain hope. School cases in 50 of Mississippi's 148 districts are to be reopened in the fall. A spokesman for the NAACP Legal Defense and Educational Fund, Inc., the most active agency in the legal battle for school desegregation, was confident that in most of those districts freedom-of-choice would be discarded and zone or pairing plans required. The spokesman also stated that such action would result in whites pulling out of the public schools in several districts. "It depends on the

district," he said. "Where whites are proud of the schools, where the schools are good, whites will stay. In the Delta, where schools are bad, whites will probably pull out." He cited Corinth, a relatively prosperous community in northern Mississippi, as an example of a good school system's holding whites in spite of a comprehensive zone plan that would result in substantial desegregation. Though Mississippi still has a tuition grant statute, which theoretically could support private schools, there is little chance of its indefinite survival. The Legal Defense Fund spokesman, wise in the ways of Mississippi, and still hopeful, said, "Whites will probably go through the full cycle of resistance and come back to reconciliation again--just as they did before." He felt that the South might yet solve the problem of desegregation before the North began, really, to grapple with it.

The Pattern of Failure

There was the chance, a slim one, that the courts might succeed, might assure justice at last to school children in the South. But all the foregoing history indicates failure, and the results of the first year of the second judicial era bear out this gloomy prophesy. Though no official figures were available in late September, 1968, the old pattern seemed to hold. A few more Negroes in school with whites in the cities; in some instances rural "Negro" schools closed and the entire student body absorbed by the "white" ones; a minuscule number of whites in formerly all-Negro schools. The second judicial era would, it seemed,

encounter the same dilemma that doomed the first one: Governor Lurleen Wallace, paraphrasing another Southerner who flouted the law when it suited him to do so, said of the Fifth Circuit ruling, "They have made their decision, now let them enforce it."

Why those who had lived through the first era, had watched the few children life-scarred for the privilege of entering a <u>building</u>, fanned the old hope again is probably irrelevant. But the results of fourteen long years of methodizing, legalizing, computerizing, analyzing, and finally, mortifying what is, after all, the basic right of every American child--the right to a good education, the right to enter any building to get that education--will long be felt in this nation.

We teach children, all children, that the United States of America is dedicated to law and order. We lie. We have shown a generation of American children, in the public institution closest to their lives, the schools, that this nation's fundamental law need not be obeyed; we have clearly demonstrated to them that what we expect is their conformity to lipservice to the shibboleth. What will be the awful effects of this lie upon children, black and white alike? What depths of disillusionment when they hear us say "law" and observe only "order?"

After a generation has beheld successful evasion, rationalized vaccillation, outright flaunting of the law, only a country absolutely wedded to the totalitarian concept of order without law could turn on the victims of lawlessness and accuse them of destroying the fabric of society.

PART II

THE CONGRESS, THE COURTS, AND THE NATIONAL WILL

by Robert E. Anderson, Jr.
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The story of how desegregation still hovers at a low level of tokenism involves not only official defiance of the federal government and intimidation of Negro parents and students but, of late, extremely effective persuasion by southern congressmen.

In 1966, a southern assault on the HEW guidelines was directed primarily at desegregation percentage requirements which HEW said were used only to measure a school system's rate of progress from one year to the other. Southerners said the percentages were promulgated to bring about racial balance in the schools in violation of the 1964 Civil Rights Act. The southern strategy, appealing to northern fears that HEW's next move would be to attack de facto segregation and the sanctity of the neighborhood school, was partially successful in emasculating the guidelines. The House voted to require the U. S. Office of Education to hold a full hearing before withholding funds from a school district considered to be in violation of the guidelines. A House-Senate conference changed the provision to allow for fund "deferrals," provided a hearing be held within 60 days. In addition, the Southerners succeeded in slashing HEW's budget request for funds to increase its compliance staff.

In 1967, House Southerners largely remained in the background as a northern liberal -- Rep. Edith Green (D.-Ore.) -- fought their segregation battles for them. In amendments

to the Elementary and Secondary Education Act of 1967, Rep. Green succeeded in requiring HEW to apply its school desegregation guidelines uniformly to all 50 states, and to cite statutory authority under which it withheld federal funds from noncomplying districts. Southerners supported both measures, charging that in the past, HEW acted discriminatorily in applying the guidelines only to the South and illegally in denying funds without authority of the Civil Rights Act. Southern civil rights forces were disappointed at the adoption of the amendments which they saw as no more than spiteful diversionary tactics designed to fragment HEW's compliance efforts in the South.

Southern officialdom gained another victory in 1967 when a Senate attack led by Georgia Senator Richard Russell resulted in a policy statement from the Secretary of Health, Education, and Welfare, pledging that the agency would give school systems notice of any possible fund termination six months prior to the start of the school year. Earlier Russell had introduced an amendment to the Secondary and Elementary Education Act, which would have flatly prohibited HEW from cutting off funds at any time during the school year. Senator Wayne Morse, floor manager for the bill, said he could not accept the Russell amendment. Southerners, no friends of federal aid to education anyway, threatened to filibuster the whole bill to death if he did not. But the policy pledge by Secretary Gardner placated Southerners.

They abandoned their efforts to enact the Russell amendment. Interestingly, however, Russell, on the floor of the Senate, later admitted that he had "no assurance whatsoever" that his measure could have passed. He conceded the Secretary's policy statement was probably for his forces better than passage of his own amendment because it might have been killed in a Senate-House conference. In a letter to his Senate colleagues, Russell said the compromise represented a larger concession than he had thought possible.

In June of 1968, a coalition of Southerners and northern moderates united in the House to bring about what Georgia Congressman John Flynt described as "congressional sanction to 'freedom-of-choice.'" On a crucial 139-109 tally, the House voted to retain the so-called "Whitten Amendment" to the HEW Appropriations Act. That amendment (named after its sponsor, Rep. Jamie Whitten, D.-Miss.) stated:

> 409. No part of the funds contained in this Act may be used to force busing of students, abolishment of any school, or to force any student attending any secondary school to attend a particular school against the choice of his or her parents or parent.
>
> 410. No part of the funds contained in this Act shall be used to force busing of students, the abolishment of any school or the attendance of students of a particular school as a condition precedent to obtaining federal funds otherwise available to any state, school district, or school.

Proponents of the amendment were frank in seeking to link their cause with that of northern advocates of the neighborhood school. Rep. Whitten warned his colleagues that "what has been visited upon certain areas of the country is about to spread throughout the nation." Rep. Robert L. F. Sikes (D.-Fla.) after describing what he termed "harassment" of school officials in Florida concluded:

> This is what is happening to schools throughout the land. Probably it has happened to your schools. If not, it will.

Rep. Charles E. Goodell (R.-N. Y.), speaking against the amendment, stated the issue clearly: "The two amendments . . . specifically provide that no federal money can be used to assist school districts in their plans, or to press school districts in their plans to meet the Supreme Court decision."

Rep. Emmanuel Cellar (D.-N. Y.) was even more blunt. "What is sought here is to overturn the Supreme Court decision /regarding freedom-of-choice/."

Rep. Whitten denied that it was his intention to nullify the court decree; however, he declared that when it came to appropriations, "we don't have to pay any more attention to the courts than we want to."

The impact of the House action sent shock waves into civil rights ranks, raising serious doubts as to the congressional will on its own school desegregation legislation. Despite the fact that HEW, under reorganized enforcement procedures, continued to talk tough about its future plans and, conceding the goodwill and intentions of its compliance officers, the agency would obviously have been crippled in its enforcement efforts by the Whitten amendment. Some civil rights observers thought the amendment would so seriously restrict future HEW desegregation efforts as not only to legalize freedom-of-choice desegregation plans but to make them the only sort of desegregation plans acceptable. Rep. Goodell, for example, put it this way:

> The indirect effect of this, I fear, will be that school districts which are negotiating with the federal government as to how they can get full integration in their school systems . . . will find themselves in a position that when the school board redistricts it will not be able to assign pupils unless the parents of all these pupils agree and give their consent.

The Whitten amendment -- pushed in the Senate by Georgia Senator Richard Russell -- ran into opposition in the Senate Appropriations Committee. Liberals succeeded in adding a clause making the appropriations restrictions applicable only to instances where HEW might attempt to "overcome racial im-

balance." Southerners on the committee gained concessions from their northern colleagues when the committee approved another Russell-sponsored amendment requiring HEW to assign as many compliance officers to northern states as to the South.* The committee also approved two other segregationist amendments, preventing HEW from cutting off funds derived from timber taxes or from denying school lunch and medical service funds to southern schools. In September, the full Senate approved the committee bill with the amendments cited.

House proponents of the legislation, however, were set for a showdown fight and in a House-Senate conference committee succeeded in reinstating the Whitten Amendment. The appropriations bill was resubmitted to the House which in an abrupt about-face rejected the Whitten Amendment outright by a 175-167 vote. Southern civil rights forces, prepared for the worst, were astounded; southern congressmen abjected. "We had the votes," lamented Georgia Congressman John Flynt, "if the people had been there."

The Congress v. the Courts

Beyond the immediate effects of the congressional action on school desegregation (and the mere fact that the Whitten Amendment could gain the northern support that it

*The amendment seemed to represent a basic contradiction. For to require HEW to devote as much effort to desegregation in the North as in the South was to give HEW the mandate to move against de facto segregation everywhere. Yet Title IV of the Civil Rights Act forbids any action to overcome racial imbalance inherent in de facto segregation.

did was in itself a sobering commentary on the national commitment to integration), civil rights forces saw another potentially greater threat both to the civil rights cause and to civil liberties. Implicit throughout the House debate on the Whitten Amendment was the sentiment for congressional restraints on the Supreme Court. That sentiment was translated into action with passage of the controversial "anti-crime" bill, a portion of which specifically nullifies a Supreme Court decision in regard to the admissibility of voluntary confessions in criminal proceedings. Most certainly it was a factor in the decision of some senators to oppose the elevation of Justice Abe Fortas to Chief Justice of the Court.

Yet in the realities of American politics, even pessimistic civil rights advocates doubted that the Congress will succeed in actually bringing about a <u>legal</u> reversal of the Supreme Court's school desegregation decisions. Even an attempt to do so would bring the nation to a constitutional crisis such as it has not had since the Civil War. More likely, there will be continued efforts to render the rulings meaningless through appropriations restrictions and reductions. Northern liberals who seem to have no hesitance in siding with southern segregationists on such restrictions when they see <u>de facto</u> segregation threatened would hardly go along with an <u>overt</u> racist effort to nullify the courts. Southern congressmen, too, apparently have learned just how far they can take their northern colleagues. House debate on

the Whitten amendment, for instance, was largely void of the fire-eating oratory characteristic of southern congressmen in the wake of the 1954 Brown decision. Thus if current trends in the Congress continue, trends which increasingly seem to reflect opinion of a portion of white middle-class America, politely affirmative on such easy either/or issues as the end of de jure segregation in the South, but increasingly testy and antagonistic toward implementing measures that will cost more than lip service, dismantling of other civil rights enforcement and procedures might also be expected.

The federal structure itself perhaps doomed the administrative effort to achieve desegregation. Empowering an agency to carry out congressional mandate allows legislators (who control the real power) the right to give and to take away -- to speak out vehemently for civil rights and then on critical roll calls to cripple the agency charged with gauranteeing those rights. In 1964, the nation seemed bent on conferring citizenship on Negroes. Stokely Carmichael articulated black power in 1966 and white power seemed to breathe a sigh of relief that Negroes no longer deserved nor even desired the honor.

The fact is that while Northerners have only recently begun to wrestle with the thorny problems of de facto segrega-

tion, many Southerners at last have come to view the process of school desegregation as a rather dull serial in which each year begins with high expectations and ends with disappointing results. They see the slow pace of school integration as a barometer of the whole national will in the matter of civil rights enforcement. For certainly all of the law and all of the court decrees necessary for the fulfillment of a century's promise have been made. What remains wanting, after all of the high and noble sentiments have been expressed, is the commitment to implement them.

In the meanwhile, the disgrace of continued failure to bring about an end to dual schools was having precisely the effect that white racist elements in the South had striven without success in previous years to bring about. As the summer of 1968 unfolded and a new school year approached, many Negroes, reflecting in varying degrees a concept of "black awareness," had come to feel that school desegregation is no longer a relevant issue. "Why don't whites ever transfer to our schools? Why should we be the ones to do all the sacrificing?" Some voice the attitude, too, that if "quality" education can be achieved in an all-Negro school, then why should Negro children suffer the pain, the estrangement, the cruelty they subject themselves to in desegregating a "previously all-white school." "Separate but equal," never achiev-

ed when it was the law of the land, becomes now a sour goal of the disappointed, disillusioned, and betrayed.

APPENDIX I

JEFFERSON COUNTY AND MACON COUNTY SCHOOL DESEGREGATION DECISIONS

by

William Robert Gignilliat, III

and

Kenneth M. Horwitz

Mr. Gignilliat and Mr. Horwitz are recent graduates of Emory University Law School. Their paper was produced under the direction of SRC's research staff.

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APPENDIX I

The Jefferson County and Macon County decisions, analyzed in Appendix I, were the most significant school desegregation court actions of the 1960's. Jefferson County initiated a period of extensive judicial examination of the efficacy of freedom-of-choice as a means of abolishing the dual school structure and eliminating its effects. The Fifth Circuit Court of Appeals in Jefferson stressed school administrators' affirmative duty to erase the designations "Negro" and "white" schools and to offer children of both races a desegregated, equal education.

The federal district court for the middle district of Alabama, in its historic Macon County decision, recognized state school officials' responsibility for disestablishing the system of school segregation still prevalent in Alabama. Placing state officials under court order, federal district judges in effect undertook supervision of the elimination of the dual school structure throughout the state of Alabama.

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JEFFERSON COUNTY AND MACON COUNTY SCHOOL DESEGREGATION DECISIONS

The Federal Mandate

Congress in Title VI of the Civil Rights Act of 1964 gave to the Department of Health, Education, and Welfare (HEW) authority for securing school desegregation in all local school systems receiving federal financial assistance. Pursuant to the provisions of Title VI and to the subsequent regulations,[1] HEW issued Statements of Policy (guidelines).[2]

Under the guideline procedures based upon the HEW regulations, school districts without dual school systems (presumed to be without racial discrimination) could file HEW Form 441 indicating that they were in full and immediate compliance with Title VI and the HEW regulations. These school systems would then be eligible to receive federal aid, and had no further obligation. Only if a complaint were filed and substantiated would HEW require additional assurance from the school district.

A district which operated a dual school system was required to file HEW Form 441-B. This indicated the school district had submitted a voluntary plan to desegregate its schools. In the South this was usually a freedom-of-choice desegregation plan. The guidelines included the basic standards and requirements to which a desegregation plan must conform to be acceptable. HEW had the authority to decide if the plan was acceptable and to determine if the school district was complying

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[1] 45 C.F.R. Part 80 (1967). These have not been revised since they were first issued.

[2] 45 C.F.R. Part 180 (1967). The guidelines have been revised three times since they were first issued. The three revisions were in March and December, 1966, and September, 1967. It would be well to note here, as will be discussed later, that the guidelines are not regulations, were not signed by the President, and their authorization has a different basis.

with the plan subject to review. If the school system was not in compliance, or refused to desegregate, HEW was authorized to terminate all federal financial assistance to the school district. (It should be made clear that enforcement action ultimately ending in fund termination was not an arbitrary procedure by HEW compliance officials; rather HEW enforcement action included administrative safeguards: notification of suspected noncompliance, requests for voluntary modification, informal and formal hearings and appeals.) If a school system continued to refuse to comply with the requirements of the guidelines and had its funds terminated by HEW, the only way to force the district to desegregate was by going into a federal district court and obtaining a court order against the school system.

If a school district under court order to desegregate wished to continue to receive federal aid, it was required to submit to HEW the court order, accompanied by an assurance of compliance with that order. When both conditions were satisfied, the school district was automatically eligible to receive federal aid.

If a school district under a court order to desegregate would not meet these two conditions, the plaintiffs or the Justice Department could seek to rectify the situation by further litigation either in the form of a contempt proceeding or a stronger order to desegregate.

In the Fifth Circuit, a relatively large percentage* of school districts are under court order, with an even larger percentage of school children in court order districts. There are three basic reasons for this development. First, after the Brown case in 1954 and before the Civil Rights Act of 1964, the only remedy against a segregated school system was a court order. In this ten-year period most large cities in the South were put under court order to desegregate. Second, after 1954, many school districts failing to comply with the HEW guidelines

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*See Tables 1 and 2.

were brought into court to force compliance. Third, school districts desiring to avoid the stricter HEW requirements sought court orders.

The Jefferson County Case

United States v. Jefferson County Board of Education is important not only because it gathered and analyzed school desegregation law developed since 1954, but it set forth a model decree designed to produce uniformity within the Fifth Circuit. It gave major emphasis to the affirmative duty of the school boards to eliminate discrimination in public schools. The fact that a model decree was issued indicated that the Fifth Circuit Court of Appeals would no longer tolerate an evasion of the law of the land and was determined to use the power in its hands to stop such evasion.[3]

Jefferson County consists of nine school desegregation cases consolidated for hearing on appeal by the Fifth Circuit Court of Appeals.[4] Judge Wisdom wrote the first opinion, which was that of a three-judge court handed down on December 29, 1966, and which contained a major discussion of all the issues involved.[5] There was one dissent by District Judge Harold Cox, sitting by designation, who requested a hearing of the case by all twelve Fifth Circuit Court of Appeals judges. The en banc (full court) hearing produced a short, six-paragraph per curium opinion (an unsigned opinion by all concurring judges) which adopted with slight modification the opinion and model decree written by Judge Wisdom. The en banc opinion was handed down on March 29, 1967.

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[3] 372 F.2d 836 (5 Cir. 1966) affirmed on rehearing en banc Civil No. 23345 5 Cir., filed March 29, 1967.

[4] Three cases were appealed from the United States District Court for the Northern District of Alabama; five were appealed from the United States District Court for the Western District of Louisiana; and one was appealed from the United States District Court for the Eastern District of Louisiana. Two of these were added by the en banc court.

[5] 372 f.2d 836.

Although much of what was in the Wisdom opinion (particularly much of the discussion of the guidelines) is dicta (statements necessary to support directly the holding of the decision), its discussion of issues and problems makes clear the ramifications of the decision and the Model Decree.[6] In the en banc decision, there was an overwhelming acceptance of Judge Wisdom's opinion.[7]

Judge Wisdom's expression of the court's impatience with delay was apparent: "The clock has ticked the last tick for tokenism and delay in the name of deliberate speed."[8]

Judge Wisdom's opinion began with the Supreme Court's pronouncement in the Brown cases[9] -- as all school desegregation cases must -- updating it by noting the developments in the law. Making it clear that the Supreme Court did not have token desegregation in mind as the ultimate goal and that Negro school children have more than a mere right to consideration for admission to white schools,[10] the opinion indicated it has been apparent since the Brown II decision, 1955, that a single racially nondiscriminatory system must be provided.

The court emphasized that the problem in the Fifth Circuit remained the undoing of de jure segregation -- of eliminating the dual school system. The decision defined de jure and de facto segregation very carefully, attaching a meaning that is important to note in order to

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[6]Civil No. 23345, 5 Cir., March 29, 1967. All references to the Jefferson County opinion will be to Judge Wisdom's opinion (372 F.2d 836) unless otherwise specified. All references to the Model Decree will be to the en banc modification handed down March 29, 1967, unless otherwise specified.

[7]There were eight judges concurring in the en banc decision, three judges dissenting, and one separate opinion concurring in the result.

[8]372 F.2d at 896.

[9]Brown v. Board of Education, 347 U. S. 483 (1954), Brown I; Brown v. Board of Education, 349 U. S. 294 (1955), Brown II.

[10]Braxton v. Board of Public Education of Duval County, No. 4598-Civil-J, S. D. Fla., August 21, 1962; aff'd. 326 F.2d 616 (5 Cir. 1964), cert. denied 377 U. S. 924 (1964).

avoid misunderstanding the court's decision. De jure segregation, the sense of the decision holds, is segregation imposed by force of law, or in existence because of prior imposition by force of law. Force of law would include any state action, be it judicial mandate, legislative enactment, official policy, or act of a public official. De facto segregation, according to the sense of the decision, is segregation which is fortuitous, resulting entirely from private action by individuals which is in no way affected or prompted by state action. The schools in the South were segregated according to race by force of law; the schools in the South are still de jure segregated.

Confusion over duties, which the court in this decision laid to rest, can be seen in the distinction made by some between the words "integration" and "desegregation." The court's opinion emphasized throughout that the problem in the Fifth Circuit was not one of de facto segregation or racial balance, but of eliminating de jure segregation. Until the effects of de jure segregation are eliminated, de facto segregation and its concomitant problems need not be considered by the court. In the eyes of the court, this elimination must take place with the "complete disestablishment of segregation by converting the dual system to a nonracial unitary system."[11] Judge Wisdom stated repeatedly that it is the duty of school administrators to eliminate segregation imposed by force of law, and that whether one said "desegregate" or "integrate," the meaning was the same.

The stress placed on the duty of the school boards to eliminate discrimination was in large due to the lack of desegregation in the South and to the unwillingness of most southern school boards to desegregate. The need for this stress was more apparent when one looked at the argument of the counsel for Alabama in the Jefferson County case, which was a typical attempt to make a distinction between the words "integrate"

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[11] 372 F.2d at 846, n. 5.

and "desegregate," indicating that counsel considered the two words to be words of art (words idiomatic to the field of civil rights). "Desegregation" was defined as the maintenance of a dual school system with the limitation that Negro children would be allowed admission to white schools on a nonracial basis, if they applied. "Integration" was defined as actual attendance of Negro children in a school with white children. The Fifth Circuit expressly rejected this distinction and pointed out that the authorities persuasive upon the court made no such distinction.[12]

The distinction had been based on the well-known Briggs dictum, which is extracted from a United States District Court decision handed down six weeks after Brown II.[13] The words most quoted, and those now disapproved by the courts of appeals which have considered the question are as follows: "The Constitution, in other words, does not require integration. It merely forbids segregation."[14] The basis for this dictum has been discredited. The dictum itself has lost judicial acceptance, but a great number of cases cited the dictum with approval. The Fifth Circuit and other courts of appeals came to realize the stultifying effect of these words on the elimination of discrimination. The court noted that "the dictum may . . . be defensible if the Briggs court used the term 'integration' to mean an absolute command at all costs that each and every Negro child attend a racially balanced school."[15]

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[12]Judge Wisdom pointed out that the Supreme Court has avoided making a distinction. Further, the Eighth Circuit rejected any distinction in Smith v. Board of Education of Morrilton, 365 F.2d 770 (8 Cir. 1966) as did the Third Circuit in Evans v. Ennis, 281 F.2d 385 (3 Cir. 1960) cert. denied 364 U. S. 933. The Civil Rights Commission used the words interchangeably in Survey of School Desegregation, 1965-66. Also the court noted that the words are defined to be synonyms in Webster's New Third International Dictionary.

[13]Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

[14]132 F. Supp. at 777.

[15]372 F.2d at 865. See also 372 F.2d at n. 61.

However, it was clear that this had not been the construction placed upon the dictum by the courts and school authorities, and so the Negro individual had been left with the necessity of asserting his individual and class right -- a right which would, under Briggs, be continuously and unconstitutionally denied him by state action until, as an individual, he acted. It cannot be over-emphasized that the Fifth Circuit Court of Appeals expressly rejected the dictum and overruled prior cases to the contrary, because many southern politicians and school boards have used the dictum as support for their position that they were under no particular duty to promote desegregation. Therefore, most have made no effort to do so other than to allow Negro children to go to white schools by operation of the pupil placement laws, leaving Negro Southerners, as a group, still segregated.

Administrators' "Affirmative Duty"

The court regarded as its task the elimination of the duality of school structure and of the labels (white and Negro) attached to the schools. Permitting school desegregation to take place was not enough; discrimination had to be ended since it was discrimination that was the forbidden act. Judge Wisdom adopted in his opinion the statement made by Judge Sobeloff in Wanner v. County School Board of Arlington County: "If a school board is constitutionally forbidden to institute a system of racial segregation . . . it is likewise forbidden to perpetuate a system that has been so instituted."[16]

The right to desegregated schools and to a nondiscriminatory school system has been established as a personal constitutional right. But cases subsequent to the original school segregation cases were class actions, and school systems were ordered to halt discrimination against Negroes as a class. Judge Wisdom stated in Jefferson County: " . . . .

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[16]357 F.2d 452, 454 (4 Cir. 1966), quoted 372 F.2d at 877.

Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes."[17] The court in Jefferson County emphasized the Supreme Court's procedures in the school segregation cases:

> . . . . MOREOVER, THE DELAY OF ONE YEAR IN DECIDING BROWN II AND THE GRADUAL REMEDY BROWN II FASHIONED CAN BE JUSTIFIED ONLY ON THE GROUND THAT THE 'PERSONAL AND PRESENT' RIGHT OF THE INDIVIDUAL PLAINTIFFS MUST YIELD TO THE OVER-RIDING RIGHT OF NEGROES AS A CLASS TO A COMPLETELY INTEGRATED PUBLIC EDUCATION.[18] (Emphasis supplied by the court.)

In order to establish the fulfillment of these rights, the court imposed an "affirmative duty" upon school authorities to see that desegregation was accomplished, a duty which prior to this decision was not made clear to the school administrators in the South. The Fourth, Sixth, and Eighth Circuit Courts of Appeals announced a course of action that required the initiative in school desegregation to come from school authorities.[19]

Judge Wisdom repeatedly stated the school administrator's duty to eliminate segregation imposed by force of law to "bring about an integrated, unitary school system in which there are no Negro schools and no white schools-- just schools."[20]

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[17] 373 F.2d at 868.

[18] Id. at 868.

[19] Bowman v. County School Board of Charles City County, Civil No. 10793 (4 Cir., June 12, 1967); Northcross v. Board of Education of the City of Memphis, 302 F. 2d 817 (6 Cir. 1962); Clark v. Board of Education of the Little Rock School District, 369 F.2d 661 (8 Cir. 1966). These four circuits cover 22 states: the Fourth Circuit includes Maryland, Virginia, West Virginia, North and South Carolina; the Fifth Circuit includes Florida, Georgia, Alabama, Louisiana, Mississippi, Texas, and the Canal Zone; the Sixth Circuit includes Ohio, Michigan, Kentucky, and Tennessee; and the Eighth Circuit includes Minnesota, Iowa, Missouri, Arkansas, Nebraska, North and South Dakota.

[20] 380 F.2d at 389.

The Fifth Circuit Court of Appeals concluded that "a national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed."[21] It considered the methods devised by HEW to be alternatives to court-formulated methods of implementation. The court turned in this direction for several reasons.

Under HEW regulations, if a school system was under a final order of a court and had agreed to comply with it, the requirements for that school system under the Civil Rights Act of 1964 were deemed satisfied. This being so, if the courts required less than HEW, school systems could avoid the stiffer standards of the administrative agency by seeking a court order.[22] The satisfaction of HEW desegregation requirements becomes more significant when one considers that the enforcement mechanism of the Civil Rights Act is the withdrawal of federal financial assistance so that, in effect, federal judges are in the position of ratifying the dispensing of federal financial assistance to those school districts under a final court order. There is a constitutional mandate[23] supported by national and congressional policy in favor of fewer delays in integration, for segregation is not just a wrong against an individual plaintiff in a particular case, but against a whole class of citizens. The need for uniformity in treatment and in granting of rights to this class was a strong argument to the Fifth Circuit Court. The use of

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[21] 372 F.2d at 847.

[22] For instance, such was the case with twenty Louisiana school districts. See 372 F.2d at 859.

[23] In Bradley v. School Board of the City of Richmond, 382 U. S. 103, 105 (1965), the Supreme Court stated, "Delays in school desegregation are no longer tolerable."

guideline requirements was a means to fulfill that policy.[24]

It should also be noted that HEW was considered by the courts to have a special expertise in the field of education, an expertise which federal judges do not usually possess. It should come as no surprise that the Fifth Circuit Court of Appeals regarded the guidelines in a very favorable light, for not only this court, but also the Fourth and Eighth Circuits indicated as early as 1965 that great weight should be given the guidelines. The Fifth and Eighth Circuits have indicated that the guideline standards would rarely, if ever, be other than the minimum.[25] The Fifth Circuit, in Davis v. Board of School Commissioners of Mobile County,[26] ordered changes in a school desegregation plan to conform with changes in the HEW guidelines.

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[24]There has been a three-judge district court decision involving the guidelines directly. Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346 (M. D. Ala., 1967) involved two aspects of the guidelines (45 C. F. R. Part 180). The first was whether a state may constitutionally legislate to declare null and void in that state the action of a federal agency under an Act of Congress. The court answered that the state may not so legislate, whether or not the agency action is valid. The second was whether the guidelines were valid. The court held that it must defer to decision and holdings of the Fifth Circuit Court of Appeals in Jefferson County to the effect that the guidelines were constitutional and within the 1964 Civil Rights Act. In arriving at this decision, the district court made the following observations about the guidelines:

> The guidelines, as their title indicates, are simply a statement of policies for school desegregation plans by the Office of Education, U. S. Department of Health, Education, and Welfare. They are not an exercise of rule-making power and hence do not have the 'status of law.' Any department or agency action terminating or refusing to grant or to continue financial assistance is subject to plenary judicial review. In the absence of judicial review, the school authorities may and should respect the guidelines as a reliable guide to what the Department's enforcement action should be.

[25]Singleton v. Jackson Municipal Separate School District, 355 F.2d 815 (5 Cir. 1966); Price v. Denison Independent School District, 348 F.2d 1010 (5 Cir. 1965); Singleton v. Jackson Municipal Separate School District, 348 F.2d 729 (5 Cir. 1965); Bowman v. County School Board of Charles City County, Civil No. 10793 (4 Cir. June 12, 1967); Smith v. Board of Education of Morrilton, 365 F.2d 770 (8 Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8 Cir. 1966).

[26]364 F. 2d 896 (5 Cir. 1966).

Again, in Jefferson County, the Fifth Circuit welcomed the guidelines as an effective, prompt, and orderly method of eliminating dual school systems in the South -- emphasizing that the guidelines were simply being used to disestablish de jure segregation. Indeed, the court recognized that failure of the courts to do more than effect a qualitative change was the factor that moved Congress to act in 1964.[27]

Though it welcomed the Civil Rights Act and the guidelines, the court made clear the nonbinding nature of the guidelines on federal courts, indicating that the guidelines were merely statements of policy which HEW might use to inform those with whom it dealt of what it considered to be evidence of compliance with the Civil Rights Act of 1964.

Since the Fifth Circuit Court of Appeals adopted the requirements of the guidelines as their own, there was another facet of the validity of the guidelines which the court in Jefferson County had to decide: Were those requirements used in the guidelines, without regard to whether they were authorized by the Civil Rights Act, a constitutional method of eliminating segregation? The court, not restricted by authorizations given in an Act of Congress and limited only by the provisions of the Constitution,[28] decided it was justified in finding that it might use the guidelines' provisions, including faculty integration and percentages.

The faculty integration provision in the guidelines was found by the court in Jefferson County to be necessary for achieving a unitary school system. The court stressed that the rights it dealt with were constitutional and not established by statute.[29] Judge Wisdom, in his

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[27] 372 F.2d at 852-856.

[28] The guidelines are found to be within the authorization of the 1964 Civil Rights Act. See also supra n. 3.

[29] 372 F.2d at 886.

supporting analysis, cited and approved the following statement of the Fourth Circuit:

> First the mandate of Brown v. Board of Education, 347 U. S. 483 (1954), forbids the consideration of race in faculty selection just as it forbids it in pupil placement. See Wheeler v. Durham City Board of Education, 346 F.2d 768, 773 (4 Cir. 1965). Thus the reduction in the number of Negro pupils did not justify a corresponding reduction in the number of Negro teachers. Franklin v. County Board of Giles County, 360 F.2d 325 (4 Cir. 1966). Second, the Negro school teachers were public employees who could not be discriminated against on account of their race with respect to their retention in the system. Johnson v. Branch, 364 F.2d 177 (4 Cir. 1966) . . . .[30]

This result is also indicated in Brown II. In Bradley, the Supreme Court decided that faculty desegregation was a necessary concomitant to student desegregation, and that an immediate beginning in faculty integration should be required by the courts. In Rogers v. Paul, decided at the same time as Bradley, the court held that discriminatory racial allocation of faculty denied students, in and of itself, equal educational opportunity.[31] The Fourth, Fifth, Sixth, and Eighth Circuit Courts of Appeals have all recognized, in the wake of Bradley, that faculty integration is inseparable from student integration.[32] It would seem that in light of these cases there would no longer be any question by school officials that faculty integration is required.

The court interpreted the percentage requirement of the freedom-of-choice guidelines to be a general rule of thumb to be used (both by

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[30] Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4 Cir. 1966) cited in 372 F.2d at n. 104.

[31] Rogers v. Paul, 382 U. S. 103 (1965).

[32] Braxton v. Board of Public Instruction of Duval County, 326 F.2d 616 (5 Cir. 1964) cert. denied 377 U. S. 924; Smith v. Board of Education of Morrilton, 365 F.2d 770 (8 Cir. 1966); Clark v. Board of Education of Little Rock School District, 369 F.2d 661 (8 Cir. 1966); Wheeler v. Durham City Board of Education, 363 F. 2d 738 (4 Cir. 1966); and Mapp v. Board of Education of the City of Chattanooga, 373 F.2d 75 (6 Cir. 1967).

the courts and by HEW) as an indicator to determine if progress toward the elimination of the dual school structure was being made. The percentages were to be used only in measuring the progress in those school systems electing to use the freedom-of-choice method of pupil assignment for desegregation. The percentages were not an inflexible requirement, but only an attempt to set out some objective criterion for determining whether free choice operated to eliminate the dual school system; that is, whether there was truly a free choice. Percentages were not to be the absolute determining factor, only one of several.

In addition to the percentages, other provisions included the mandatory exercise of choice, notice to parents and the public, non-discriminatory transportation, protection from interference, school equalization, faculty integration, equality of facilities within each school, and others. The court would look to each of these factors to see that a true freedom-of-choice was being assured each student.

The court pointed out that courts have used the percentage criterion in determining whether constitutional rights have been violated in other types of cases -- namely, voting rights, jury and jury venire, and reapportionment [33] -- not to effect a racial balance, but rather as an

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[33] See 372 F.2d at 886-888, n. 107 and n. 108, for a discussion of Supreme Court and courts of appeals cases in which such use has been validated and used by the courts. Judge Wisdom cited and quoted a voting rights case which was particularly suitable here:

> An appropriate remedy should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination. If it were, the state could seal into permanent existence the injustices of the past.

United States v. Duke, 332 F.2d 759, 768 (5 Cir. 1964). For instance, the power of a court of equity (and all federal courts sitting on desegregation cases act as courts of equity, Brown II) extends to re-registration of all voters in a number of parishes where discrimination has occurred. United States v. Louisiana, 255 F. Supp. 353 (E.D. La. 1963) aff'd. 380 U. S. 145 (1965). It would seem that the power of courts are quite extensive where discrimination has been widely practiced, as in the South. It should also be emphasized that the Supreme Court, in Brown II, left very wide discretion in the lower courts and has relatively infrequently guided the direction of their efforts.

objective indication of whether discrimination was being practiced. The percentage was used only as evidence that this factor, discrimination, existed.

The Fifth Circuit Court of Appeals emphasized that the goal as an end in itself was not freedom-of-choice, but disestablishment of the dual school system. Freedom-of-choice was merely a method of implementing the requirement of the Constitution, and if it does not work, something else must be devised. It is clear that the freedom in freedom-of-choice must indicate a true freedom, unrestricted by official or other acts. It was not clear what course the courts would take should it become apparent that there was no true freedom-of-choice; however, the Fifth Circuit warned:

> If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom-of-choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom-of-choice is not a key that opens all doors to equal education opportunities.[34]

The significance of recent opinions must be in the emphasis placed by the court on the affirmative duty of the school boards not just to stop segregation but to eliminate discrimination and its effects. It is not at all inconsequential that the court of appeals chose to insure this result by setting out a model decree as a minimum that, although not all-encompassing, prohibited the use of a great number of methods of discrimination and avowed such methods would be prohibited by injunctions issued within the Fifth Circuit in the future. It was to be expected that, should loopholes be found in the Model Decree which would enable school boards to reduce its effect, the courts would quickly eliminate those loopholes.

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[34] 372 F.2d at 896.

The express resolve of the Court of Appeals of the Fifth Circuit that schools be integrated was set forth in the opinion and Model Decree of Jefferson County. It is significant that in both the Model Decree and in subsequent action the court maintained its resolve that the guidelines were to be minimum standards. Except for minor wording changes and a few additional provisions and structural reorganization, the Model Decree set forth in Jefferson County was essentially the same as the guidelines. However, there were differences which are significant and should be noted. Section IV(a) of the Model Decree provides that a new choice at the first of the new school term will be given any student who was not assigned to the school of his choice (for whatever reason). Section VI of the Model Decree provides for remedial education of children disadvantaged by segregated schooling. Section VII of the Model Decree provides for choice of sites for new construction which will not tend to perpetuate dual schools. (The last provision -- as to construction -- may be covered by the HEW regulations by implication).[35]

Although the Model Decree contained provisions which the guidelines did not, there are only minor provisions in the guidelines which do not have comparable provisions or substantive content in the Model Decree. Most of these missing provisions can be inferred from the language of Jefferson County.[36] The guidelines also contained a provision against allowing transfers of students between school systems to avoid integration, which was not provided for in the Model Decree.[37] Note particularly that, even though the percentage provisions are not in the Model Decree, they are expressly approved in both opinions and will be applied as provisions of the Model Decree.

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[35] 45 C. F. R. Part 80 (1967).

[36] 45 C. F. R. 181.17(a) and (b) (1967).

[37] 45 C. F. R. 181.16 (1967).

The court, in Jefferson County, set a minimum standard for school desegregation, and it is apparent that the court meant minimum. The treatment of cases subsequent to Jefferson County evidenced the Fifth Circuit's determination.

In companion cases involving the school boards of Houston and Bibb Counties, Georgia, the district court approved desegregation plans submitted by the school board that did not conform to the requirements set forth in the model decree of Jefferson County.[38] The district court-approved plans included none of the safeguards provided in the Model Decree and on the basis of a supposed shortage of money the choice form mailing requirement was waived. The plaintiffs appealed immediately to the Fifth Circuit Court of Appeals. Four days later, the court of appeals summarily reversed and remanded the cases back to the district court with instructions to conform the decrees containing the desegregation plans to be entered for the school system in light of Jefferson County.[39] As a result, the decree arising out of the further proceedings was almost identical, even to wording of the Model Decree.[40] Similar treatment has been given in at least one other case.[41] It is to be expected that future cases will be treated no differently.

There was marked contrast to the above in the reception given to school desegregation suits in the Middle District of Alabama. In the

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[38] Bivensv. Board of Education and Orphanage for Bibb County, Civil No. 1926, M. D. Ga., May 20, 1967.

[39] Bivens v. Board of Education and Orphanage for Bibb County, Civil No. 24754 (5 Cir., May 24, 1967).

[40] Bivens v. Board of Education and Orphanage for Bibb County, Civil No. 1926, M. D. Ga., June 29, 1967.

[41] Richard v. Christ, Civil No. 22300 (5 Cir., May 24, 1967).

Macon County case and in cases using essentially the same decree,[42] the court regarded the model decree of Jefferson County as a true minimum, for in the cases cited[43] the provisions of the Model Decree were applied to specific factual situations and were directed toward alleviating local discriminatory devices. For instance, the district court ordered the school boards to meet the requirements of a revised transportation provision. In another provision, reapproval must be obtained from the state Board of Education (which is itself under court order not to discriminate on account of race) before construction can begin on any new projects.[44]

Jefferson County goes considerably further than most district judges have been willing to venture; indeed, in a number of areas of the South, district judges have balked at any desegregation and have slowed progress on that which they could not avoid. In spite of the fact that prior to Jefferson County a number of judges adopted plans with similar provisions,[45] one might ask, in view of the pressure brought on or the private convictions of district judges, just what effect Jefferson County would have in requiring district judges to follow its lead.

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42 Lee v. Macon County Board of Education, 267 F. Supp. 458 (M. D. Ala., 1967), 36 L. W. 3225, judgment affirmed; sub. nom., Wallace v. U. S. (December 5, 1967); Harris v. Crenshaw County Board of Education, Civil No. 2455-N, M. D. Ala., April 28, 1967; and Franklin v. Barbour County Board of Education, Civil No. 2458-N, M. D. Ala., April 28, 1967.

43 Cases cited at n. 42 supra.

44 See Macon County discussion infra at p. 37.

45 Judges Grooms and Johnson of the Northern District of Alabama, Judge Thomas of the Southern District of Alabama, Judges Heebe and Christenberry of the Eastern District of Louisiana, and Judge Russell of the Southern District of Mississippi are among those who handed down decisions prior to Jefferson County more or less comparable to the standards in the Model Decree.

Implicit in the question is a query as to the system of administration of justice and how rulings of upper or appellate courts affect rulings in lower courts.

Stare Decisis is a matter of policy not absolutely binding on the lower courts.[46] As a matter of law, the lower courts may not violate the Constitution. Therefore, as to those matters of law on which the Supreme Court has spoken, a lower court would not rule contrary to a doctrine of law announced by the Supreme Court. However, it is indeed improbable that anything would happen beyond reversal of the lower court decision, if appealed, if such a ruling should occur. (There is the extremely unlikely possibility of impeachment.) Also, in most cases, there is room for interpretation and factual analysis which would permit a lower court judge to avoid a certain decision if he so wished, again at the risk of reversal. Once the Supreme Court has ruled on a point of law, it is the law of the land, and the decision is binding on all lower courts,[47] state and federal, although it is clear that certain state courts avoid many decisions in cases to which they are not a party. A federal court is in no way bound by the decision of another court on the same level (i.e., district court-district court), except in the same case, nor is a district court in one circuit bound by a decision of a court of appeals in another circuit. It is just as clear that any court may adopt the decision of any other court if it wishes,

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46 Once jurisdiction in a case is taken, if a previous case similar in fact and question of law has been decided by a court above or by the same court, then the court is limited by Stare Decisis, which is the practice of following precedent. It is rare indeed for a case to have exactly the same issues of fact and law, so that, as indicated, the lower court may distinguish a case on its facts and decide it contrary to previous authority, subject of course to the possibility of reversal by the higher court.

47 Bower v. U. S., 192 F.2d 515 (5 Cir. 1951). CERT. DENIED, 343 U. S. 943, REHEARING DENIED 343 U. S. 988 (1951).

if there is no binding precedent which it must follow. There are also several district court decisions which indicate that district courts are bound by decisions of their court of appeals; however, the district court would be free to make factual distinctions and vary their decision accordingly.[48]

It must be emphasized that once there is a conclusive and final adjudication as to all questions of fact or law by a court, the parties are bound. This is referred to as "Res Judicata," and applies to questions of law and fact, but only when the parties and the questions are the same in the two cases under consideration. Stare Decisis acts only on questions of law.[49]

In view of the summary reversal given the district court, approved desegregation plans for Bibb and Houston Counties,[50] and in view of the rule of Stare Decisis, it would seem that few judges would invite similar treatment of one of their own cases, and those who do would quickly be required in each case to follow Jefferson County.

Lee v. Macon County Board of Education[51] decided March 22, 1967, by a three-judge federal district court[52] in the Middle District of Alabama, had been before the district court in Alabama on several occasions. To understand the novelty of this decision, which is the remedy that the court fashioned, it is necessary to outline the prior history of the case.

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[48] Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346 (M. D. Ala., 1967).

[49] Hansberry v. Lee, 311 U. S. 32 (1940); Hart Stell Company v. R. R. Supply Company, 244 U. S. 294 (1961); Kessler v. Eldred, 206 U. S. 285 (1906); Hale v. Finch, 104 U. S. 261 (1880); Kern v. Hurley, 179 F.2d 888 (8 Cir. 1950); 28 U. S. C. Rule 65 (d).

[50] Supra at n. 40.

[51] Lee v. Macon County Board of Education, 267 F. Supp. 458 (M. D. Ala., 1967), 36 L. W. 3225, judgment affirmed, sub. nom., Wallace v. U.S. (December 5, 1967); Harris v. Crenshaw County Board of Education, Civil No. 2455-N, M. D. Ala., April 28, 1967; and Franklin V. Barbour County Board of Education, Civil No. 2458-N, M. D. Ala., April 28, 1967.

[52] 28 U. S. C. 2281 (1964).

The suit was originally filed in 1963 on behalf of Negro school children by their parents against the Macon County Board of Education as a typical school desegregation class action to desegregate public schools in the county. The district court in the first decision ordered the public schools of Macon County desegregated.[53] On three separate occasions during the following school year (1963-1964), the district court had to enjoin state officials from various types of interference in desegregation attempts of the local (Macon County) school board.[54]

The second time this case came before the district court, in early 1964, the court permitted the plaintiffs to add as defendants the Governor of Alabama (in his capacity as Governor of the state of Alabama, and as ex officio head of the State Board of Education), the State Superintendent of Education, and the individual members of the Alabama State Board of Education. These defendants were necessary because of the relief sought by the plaintiffs in their supplemental complaint, which requested the district court: "(1) to enjoin the

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53 Lee v. Macon County Board of Education, 221 F. Supp. 297 (M. D. Ala., 1963). The district court found that the action was a proper class action; that the defendant school board operated a compulsory biracial school system; that all pupils, teachers, and other school personnel were assigned solely on the basis of race or color; that the school board was under a constitutional obligation to eliminate the compulsory biracial school system; and held that the school board's discriminatory conduct violated plaintiff's rights under the Fourteenth Amendment. The court enjoined the defendants from "failing to make an immediate start" in desegregating the county's schools and ordered the Board of Education to submit a general plan for desegregating the county's schools.

54 United States v. Wallace, 222 F. Supp. 485 (M. D. Ala., 1963) was a temporary injunction against Governor Wallace's directing by executive order that no integration occur in the public schools of Tuskegee, Birmingham, and Mobile, and against the governor's use of state patrolmen to interfere with integration. Lee v. Macon County Board of Education (order of February 3, 1964) was a temporary restraining order against Alabama and Macon County school officials to prevent them from interfering with the admission of Negro students to one school in the system, Macon County High School. United States v. Rea, 231 F. Supp. 772 (M. D. Ala., 1964) was an injunction against the use of town civil disturbance and fire ordinances enacted as subterfuge measures for preventing integration.

defendants from operating a dual school system based upon race throughout the state of Alabama; (2) to enter an order requiring statewide desegregation of schools in the state of Alabama; (3) to enjoin the use of state funds to perpetuate the dual school system; and (4) to enjoin as unconstitutional the 1963 tuition grant law."[55] A three-judge district court was impaneled to hear the case.[56]

The court concluded that the state of Alabama maintained and operated a dual school system based upon race throughout the state of Alabama and that it was the policy of the state, and, in particular, of the defendant state officials, to promote and encourage racially segregated schools. Therefore, the defendant state officials were enjoined from:

> Interfering with, preventing, or obstructing by any means, the elimination of racial discrimination by local school officials in any school district in the state of Alabama;
>
> Approving, authorizing, or paying any tuition grant . . . for the attendance of any person in a school in which enrollment or attendance is limited or restricted upon the basis of race or color;
>
> Failing, in the exercise of its control and supervision over the public schools of the state, to use such control and supervision in such a manner as to promote and encourage the elimination of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.[57]

The court did not enter the order requested by the plaintiffs requiring statewide desegregation of the public schools in Alabama. But the court specifically warned the defendant state officials that " . . . . it is only a question of time until such illegal and unconstitutional

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[55] Lee v. Macon County Board of Education, 231 F. Supp. 743 (M. D. Ala., 1964).

[56] 28 U. S. C. 2281 F. Supp. 743.

[57] Lee v. Macon County Board of Education, 267 F. Supp. 458, 461 (M. D. Ala., 1967).

support of segregated school systems must cease."[58]

The foregoing history of the case sets the stage for examining the court's third decision of Lee v. Macon County Board of Education; the decision of March 22, 1967.

The three-judge district court opinion reviewed the court's position on the second decision of the case:

> It was only 'through the exercise of considerable judicial restraint' that this court refrained in July, 1964, from requiring these defendant state officials to exercise their control and authority over the various local school boards throughout the state for the purpose of desegregating the school systems on a state-wide basis and to enjoin said defendants from using state funds for the purpose of perpetuating a dual school system based upon race. The exercise of restraint in that instance was prompted by the desire on the part of each member of this court to afford these defendants every opportunity to comply in good faith with their affirmative constitutional duty to desegregate the state's public schools.[59]

The court then affirmed that:

> . . . . It is now evident that the reasons for this court's reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.[60]

The court held that the defendants' activities controlled public education in the state of Alabama and that the conduct and activity of the defendants violated plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States.[61]

The court turned to the problem of devising a remedy which "must be designed to reach the limits of the defendants' activities in these several areas and must be designed to require the defendants to do what they have been unwilling to do on their own . . . ."[62] The court con-

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[58] Lee v. Macon County Board of Education, 231 F. Supp. 743, 756 (M. D. Ala., 1964).

[59] Lee v. Macon County Board of Education, 267 F. Supp. 464 (M. D. Ala., 1967).

[60] Id. at 465.

[61] Id. at 475.

[62] Id. at 478.

cluded that they could ". . . . conceive of no other effective way to give the plaintiffs the relief to which they are entitled under the evidence in this case than to enter a uniform statewide plan for school desegregation, made applicable to each local county and city system not already under court order to desegregate, and to require these defendants to implement it."[63] The court included in its decree "the minimum constitutional requirements for school desegregation . . . ."[64] which the defendant state officials would be required to implement.

The decision permanently enjoined state officials from discriminating on the basis of race in the operation or the conduct of the Alabama public schools. The additional broad guiding principle governing the specific actions required of state officials was that ". . . . said defendants shall take affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in their activities and their operation of the public school systems throughout the state."[65]

The decree against state officials set out with particularity the specific duties which the court would require of them. These duties may be summarized:[66]

School Construction and Consolidation.--The State Superintendent of Education was ordered to review all consolidation plans that resulted from statewide surveys prior to this decision. In addition, he was ordered to continue surveying local school systems and to require the survey-makers to meet standards which the court set out. All surveys for construction

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[63]Id. at 478.

[64]Id.

[65]Id. at 480.

[66]The summary is only an indication of what was required by the court; the complete requirements may be compared with the summary. 267 F. Supp. 480-91.

or expansion taken before this decision were excluded unless they met the court's standards. Approval of construction or expansion by the State Superintendent of Education could only be given if the action would result in the disestablishment of segregated public schools.

Teachers.--The State Superintendent of Education was ordered to develop a detailed program "for assisting and encouraging faculty desegregation in the local school systems throughout the state . . . ."[67] This program must provide for assistance to local systems in recruiting, placing, and reassigning teachers on a desegregated basis, and for assistance in providing training which may be necessary to upgrade the qualifications of some teachers in order to facilitate faculty desegregation. The State Department of Education must conduct all teacher institutes, in-service training, and certification without discrimination on the basis of race.

School Transportation.--Race must be eliminated as a basis for assigning students to school buses. Overlapping and duplicative bus routes based on race must be redrawn so as to meet nondiscriminatory criteria governing the availability of bus transportation to students within the school district. The reconstructed bus routes must be communicated by the school officials to students and parents in a readily understandable manner.

Equalization of Facilities.--The Superintendent of Education was ordered to develop and submit to the court a detailed program for equalizing the quality of physical facilities, equipment, services, courses of instruction, and instructional materials. The program must also provide the equalization of pupil-teacher ratios, per pupil expenditures, library books per pupil, and other areas of disparity between present Negro and white schools.

Information and Reports.--The State Superintendent of Education was required to submit reports to the court and to make available records and

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[67] 267 F. Supp. at 481.

other information on school desegregation.

Interference.--State officials were ordered not to interfere with, prevent, or obstruct the elimination of racial discrimination by local school officials in any school system in the state of Alabama.

Desegregation Plans for Local School Systems.--As noted above, the court decided that the only effective remedy would be a uniform statewide desegregation plan which state officials would be required to implement. All school systems in Alabama that were not already under court order to desegregate were required to adopt a desegregation plan for all grades, commencing with the 1967-68 school year. The Decree Macon County included a model decree (based upon the Jefferson County Model Decree) for the desegregation plans that local systems would adopt. There were variances in two particular sections which the court included to meet their own factual situation. The first change applied to the distribution of explanatory letters and choice forms, omitting the section that would enable school districts when unable to comply with the first class mailing provision to propose alternative methods for giving maximum notice. This omission m[illegible] the section consistent because the court had also omitted the first clas[illegible] mailing requirements. The second change concerned the transportation section wherein school officials were directed to redraw bus routes and criteria governing the availability of bus transportation so that race would no longer be a basis for assignment and overlapping and duplicative bus routes would be abolished. Extensive reports to the court on the new routes were to be filed.

Since the decree was directed against state officials, the Alabama Superintendent of Education had the responsibility for getting all local school systems to adopt desegregation plans based upon the Model Decree. After the March 22 decision, the Alabama Superintendent of Education submitted desegregation plans of all but one of the ninety-nine affected school systems under the terms of the decision. The state Superintendent was not to judge the acceptability of the plans; rather the court would

review them to determine whether they met its requirements.

Apparently, if the desegregation plans failed to meet the court's Model Decree requirements, the court on its own motive would require the school district to modify or expand the substantive content of its plan, or, alternatively, the plaintiffs in the case could ask the court to make a particular school board a party to the suit. The district court's action against Bibb County, Alabama, substantiated this proposition.

Bibb County failed to file a desegregation plan embodying the Model Decree requirements. Refusal to comply with the court's statewide school integration decree caused the Bibb County School Board to be brought into the Macon County litigation and placed under a direct court order to comply with the court's statewide decree. This action indicates that if other school districts refused to comply, the court would possibly treat them as they did Bibb County and place them under a direct court order.

In summary, the court in the Macon County case had to eliminate the influencing factors of freedom-of-choice type desegregation plans which Alabama state officials had used to deter desegregation. In order for freedom-of-choice plans to be free, all barriers had to be removed: intimidation, coercion, unequal facilities, segregated transportation, school location, and faculty segregation. The decision and decree did more than just neutralize the power of the Alabama state officials over Alabama public schools: it enjoined their unequal and discriminatory activities; and in further relief, the court put the state officials under order and decree to take the affirmative action which was mandated by the Fifth Circuit Court of Appeals in the Jefferson County decision. The court warned state officials that their responsibility for taking affirmative action must be shouldered; for, if they did not assist local school systems in desegregating, the court would order the state to discontinue state funds to segregated school districts.

Action by state school officials -- approved by the court -- resulted in 1967 in orders closing more than eighty all-Negro schools maintained solely for separating children by race. If state school offcials interfere with school desegregation so that a factual situation exists similar to that presented to the court in Macon County, other district courts could be petitioned for relief corresponding to that fashioned by the district court in Macon County.

Following the March 22 order, compliance officers from HEW continued their efforts, including withholding federal funds, to bring school systems in Alabama (formerly under the guidelines) into voluntary compliance with the Civil Rights Act. In the course of this action, HEW declared that the Lanett School System was not eligible for federal aid. Lanett officials protested to the court that it had submitted a desegregation plan pursuant to the Macon County order, which the court had approved, and that they had assured the court they would adhere to the plan for the 1967-68 school year.

On July 28, 1967, the three-judge district court panel decided that it was up to the court to determine whether Alabama school systems were in compliance with their March 22 statewide desegregation order. The court reasoned that all the Alabama school systems were under a court order and had agreed to comply; therefore, HEW requirements were satisfied. The court ruled that HEW could continue to cut off funds for noncompliance, provided HEW had the court's approval.

In effect, this decision was the first statement by a federal court reiterating that HEW could take action against court-order districts, but only with specific approval by the court. The court invited HEW to continue its investigations and determinations regarding compliance and to report any failures in compliance to the court.

After this decision, HEW compliance officials have made it known that they consider some court-order district failing to perform as well as some guideline districts. HEW reportedly has changed its hands-off

policy towards court order districts and has begun to review a school system's compliance with its court-order in those districts previously considered immune, so that HEW can report noncompliance with the court order to the courts.[68]

Theoretically, the Jefferson County decision would require all court-order school districts within the Fifth Circuit to be placed under guideline-type desegregation plans. The problem inherent in this situation is that there is no specific party designated to conduct extensive investigations to determine whether the plans are working. Under Jefferson County and Macon County, the court would learn of non-compliance only to the extent of the coverage of the reports that have to be submitted, or if the plaintiffs investigate and demonstrate to the court that the school district is not in compliance with its court-order desegregation plan. Since Jefferson County was an attempt by the Fifth Circuit to bring together the efforts of the district courts and HEW to create uniformity, the Lanett County decision was an important step toward furthering this goal.

The actions of the Fifth Circuit Court of Appeals and the Alabama district courts appeared in 1967 to herald an era of unprecedented cooperation among the various branches of the federal government -- cooperation aimed at destroying the system of segregation in southern schools.

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[68]The Atlanta Constitution, September 18, 1967, and the Norfolk Virginian-Pilot, September 20, 1967.

TABLE 1

SCHOOL DISTRICTS - 1967

States Within the Fifth Circuit	Number of School Districts	Number of School Districts Under Court Order	Percentage
Alabama	118	19*	16.1
Florida	67	14	20.9
Georgia	197	9	4.6
Louisiana	67	45	67.7
Mississippi	149	41	27.5
Texas	1,308	14	1.1

These figures were compiled from the Office of Education Compliance Report on School Desegregation in the Seventeen Southern and Border States, No. 6 (May, 1967).

*Since Lee v. Macon County, all school districts in Alabama are under court order.

TABLE 2

SCHOOL POPULATION - 1967

States Within the Fifth Circuit	Total Public School Population	Public School Population in Court Order District	Per Cent	Total Non-White Public School Population	Non-White Public School Population in Court Order District	Per Cent
Alabama	862,041	298,717	34.7	298,064	122,064	41.0
Florida	1,330,552	679,171	51.0	*	*	N/A
Georgia	1,128,863	314,727	27.5	*	*	N/A
Louisiana	806,005	674,620	83.7	318,966	270,637	84.8
Mississippi	606,247	256,918	42.4	296,834	141,223	47.6
Texas	N/A	N/A	N/A	N/A	N/A	N/A

*Records not kept by race.

These figures were compiled by the Southern Regional Council Research staff.

APPENDIX II

The following telegram was sent on September 16, 1968, to the candidates for President of the two major political parties, Vice President Hubert H. Humphrey and Richard M. Nixon. It was signed by individuals from all parts of the South who have worked intimately through private organizations with the discouraging problem of school desegregation in the South. The telegram was sent in part because of their awareness out of past bitter experience that federal courts alone cannot prevail against the lawless spirit of resistance, that they need support and an arming with sanctions from the other branches of government.

> We the undersigned, who have long been concerned with southern school desegregation, are deeply dismayed at the lack of progress in this vital area. The effects of segregation in the South are a national, not simply a regional, problem. The issue is a key one in our country's effort to unify itself.
>
> Southern school systems, both those under federal court order and Department of Health, Education, and Welfare guidelines, have most often adopted so-called freedom-of-choice plans, placing the burden of school desegregation upon Negro school children and their parents. The Supreme Court in May, 1968, declared that freedom-of-choice was not an end in itself; in order to be acceptable school desegregation plans must be plans that work -- that is, they must eliminate the dual school system and its effects.
>
> We feel that freedom-of-choice as a method of ending the dual school structure still prevalent in the South has not worked, is not now working. What is your opinion on this important matter?
>
> The Department of Health, Education, and Welfare was authorized by Title VI of the Civil Rights Act of 1964 to terminate federal funds to school districts which perpetuated segregation. Do you, as a candidate for the nation's highest office, feel that this is an effective method of enforcing the law?
>
> If you are elected President of the United States, what action will you recommend to assure all Americans that the nation's fundamental law requiring an end to racial discrimination in education will be enforced?

Paul Anthony, Director
Southern Regional Council

Charles Morgan, Jr., Director
Southern Regional Office
American Civil Liberties Union

Hayes Mizell, Director
South Carolina Community Relations Program
American Friends Service Committee

John McCown, Director
Georgia Council on Human Relations

Allan Black, Director
South Central Office
Legal Defense and Educational Fund

Constance Curry
Southern Field Representative
American Friends Service Committee

Elijah Coleman, Director
Arkansas Council on Human Relations

Courtney Siceloff, Director
Penn Community Services Center

Bryce Joyce, Director
Alabama Council on Human Relations

Irwin Schulman, Southeastern Regional Director
Anti-Defamation League

Baxton Bryant, Director
Tennessee Council on Human Relations

A. Wilson Cheek, Executive Director
Georgia Region
National Conference of Christians and Jews

Ralph David Abernathy, President
Southern Christian Leadership Conference

Mrs. Patricia Miller, Director
Louisiana Council on Human Relations

Robert Valder, Director
Southern Office
Legal Defense and Educational Fund

Winifred Green, Director
Alabama Community Relations Program
American Friends Service Committee

Charles Wittenstein, Southeast Area Director
American Jewish Committee

Paul Matthais, Director
South Carolina Council on Human Relations

Sherrill Marcus, Regional Youth Field Director
National Association for the Advancement of Colored People

Edwin Stanfield, Executive Director
Southwest Intergroup Relations Council

Will D. Campbell, Director
Committee of Southern Churchmen

Frank Adams, Director
Virginia Council on Human Relations

Kenneth Dean, Director
Mississippi Council on Human Relations

Mrs. Frieda Mitchell, Chairman
Beaufort County, South Carolina, Education Committee